APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-2080

TILDEN R. WILKINSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge.

Argued March 3, 1982 Decided April 27, 1982

Before BUTZNER, RUSSELL and MURNAGAN, Circuit Judges.

Howard I. Legum (Fine, Fine, Legum & Fine on brief) for Appellant; James A. Metcalfe, Assistant United States Attorney (Elsie L. Munsell, United States Attorney; John Franklin, III, Taylor, Walker and Adams on brief) for Appellee.

MURNAGHAN, Circuit Judge:

We refer from time to time to a case as a hard one. We may mean that it is close and difficult to decide. Or we may mean, as we do here, that, while it is not so close, it is nevertheless difficult to decide because of its harsh impact on one of the parties. The other party to the case is innocent of any impropriety occasioning the hardship; whether others involved may have been equally free of criticism is a matter we need not address.

Here we have such a case.

On October 3, 1978, in the City of Virginia Beach, Virginia, the plaintiff, Tilden R. Wilkinson, as a pedestrian, was hit by an automobile driven by Richard Evans Gray, a first-class boatswain's mate in the United States Navy then serving aboard the U.S.S. Miller which

was undergoing repairs at a shipyard in Boston, Massachusetts.

Pursuant to orders from his commanding officer, Gray had driven a motor car leased by the U.S.S. Miller from Econo Car of Boston, a car-rental outfit, to the Norfolk, Virginia area to pick up and deliver certain items associated with the ship, including the ship's mail. Gray's residence was in Massachusetts. He was on a per diem allowance covering mileage, lodging and meals, and the accident occurred while Gray was returning to his hotel room after delivering the ship's mail with the intention of first stopping to eat dinner.

Promptly following the accident, Gray notified his commanding officer on the U.S.S. Miller and Econo Car of Boston. Shortly thereafter he was

interviewed by a representative of the law firm retained to handle the claim made by Wilkinson as a consequence of injuries caused by the accident.

Plaintiff had promptly retained Howard I. Legum as counsel to represent him with respect to his claim against Gray. Legum ascertained that the car operated by Gray was leased from Econo Car and inaugurated discussions with the lawyers retained by the insurance carrier of Econo Car. Such counsel told Legum nothing to suggest that Gray had been operating the car in the course of his employment by the Government and Legum failed to explore the possibility that such was the case.

It was not until September 16, 1980, that is over 23 months after the accident, that Legum brought suit on behalf of Wilkinson by filing a motion

for judgment in the Circuit Court of the City of Virginia Beach. Service on Gray was made via the Virginia long-arm statute. His last known address was shown to be the U.S.S. Miller, Boston, Massachusetts.

The responsive pleading made October 10, 1980, asserted that the accident occurred while Gray was acting within the scope of his employment[1] with the United States Navy, and sought dismissal for failure to comply with the Drivers Act, 28 U.S.C. § 2679(b), a provision of the Federal Tort Claims Act which reads:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury

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1 Defined in 28 U.S.C. § 2671 as "acting in line of duty."

> or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

The pleading further pointed out that there had been no presentation "in writing to the appropriate Federal agency within two years after such claim accrue[d]," 28 U.S.C. § 2401(b), with the consequence that the tort claim was "forever barred." Id.

In April 1981, a removal to the United States District Court for the Eastern District of Virginia ensued and the United States was substituted as the party defendant. Discovery had taken place in the state court and affidavits

were filed in the district court. Summary judgment then was granted to the United States.[2]

On Appeal, the plaintiff-appellant contends that:

1) Gray was not acting within the scope of his employment when the accident took place.

2) The lack of awareness on plaintiff-appellant's part of a contention that Gray was acting within the scope of his employment excused the failure to file the administrative claim within two years of the accident.

It is inescapable, however, that Gray was acting in the scope of his employment. Cooner v. United States, 276 F.2d 220 (4th Cir. 1960); Johnston v. United States, 310 F. Supp. 1, 2 (N.

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2 Wilkinson v. Gray, 523 F. Supp. 372 (E.D. Va. 1981).

D. Ga. 1970) ("The question in this case is whether the alleged negligence of a National Guardsman, away from his home at a military base on temporary active duty, receiving per diem pay, who drives to lunch at a public eating house in a truck furnished him by the government for that purpose, can be imputed to the United States government under the Georgia law of respondeat superior. The court holds that it can."); Southern Motor Lines Co. v. Alvis, 200 Va. 168, 170-72, 104 S.E.2d 735, 737-39 (1958).

Just as clearly, the passage of two years without the filing of the administrative claim was fatal to Wilkinson's case. Wollman v. Gross, 637 F.2d 544, 547 (8th Cir. 1980) (2-1 decision, rehearing en banc denied by an equally divided vote, 646 F.2d 1306 (8th Cir. 1981)) ("Prior to bringing a

suit a claim must be presented in writing to the appropriate administrative agency 'within two years after such claim accrues'"); Kielwien v. United States, 540 F.2d 676, 679 (4th Cir. 1975), cert. denied, 429 U.S. 929 (1976) ("That requirement is jurisdictional and is not waivable.").

Wilkinson would escape the holding in Wollman and the cases there cited,[3] on the grounds that he was lulled by Gray or by the United States into a false sense of security. Cf. Kelley v. United States, 568 F.2d 259, 262 (2d Cir. 1978), holding that "the Government

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3 West v. United States, 592 F.2d 487 (8th Cir. 1979); Steele v. United States, 599 F.2d 823 (7th Cir. 1979); Lien v. Beehner, 453 F.Supp. 604 (N.D.N.Y. 1978); Baker v. United States, 341 F. Supp. 494 (D. Md.), aff'd, (4th Cir. 1972); Driggers v. United

could not lull plaintiffs into a false sense of security by waiting until plaintiffs' time to file an administrative claim had expired and thereupon move to be substituted and to dismiss."

The Government here is not open to such a charge. Econo Car's insurance carrier was the party with whom Legum, counsel for Wilkinson, negotiated prior to filing suit. As in Wollman v. Gross, supra, 637 F.2d at 549, plaintiff-appellant was aware at the time of the

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3 (Cont'd) States, 309 F.Supp. 1377 (D. S.C. 1970). See also McGowan v. Williams, 481 F.Supp. 681 (N.D.Ill. 1979) [reversed, 623 F.2d 1239 (7th Cir. 1980), on grounds other than those involved in the present case]; Reiser v. Di Pietro, 78 F.R.D. 541 (N.D.Ill. 1978); Fuller v. Daniel, 438 F.Supp. 928 (N.D.Ala. 1977); Miller v. United States, 418 F.Supp. 373, 377 (D.Minn. 1976).

637 F.2d at 550.

accident that Gray was employed by the Navy.

> He was aware only of the legal significance of this fact. The purpose of the statute of limitations is to require the reasonably diligent presentation of tort claims. This may require a plaintiff to obtain appropriate legal counsel and together with counsel discover the facts and their possible legal ramifications so as to enable plaintiff to bring the suit within a reasonable time.

Id.[4]

Gray himself did all that he could reasonably be expected to do in promptly informing his commanding officer and

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4 The court in Wollman, further observed, 637 F.2d at 549 n.6:

> It does not seem unreasonable to expect Wollman, who was aware that Gross was an ASCS employee, to so inform his counsel, or for counsel to then research the status of ASCS employees for consideration of an FTCA claim.

Econo Car. He cooperatively gave an interview to counsel provided by Econo Car's insurance carrier to defend him. Gray's commanding officer has not been shown to have had any duty to supply information to Wilkinson or Legum. It has nowhere in the record been established that Gray's commanding officer even knew that there was any lack of awareness by them that the proper and exclusive defendant was the United States Government, or that there was a legal necessity for Wilkinson to file, within two years, an administrative claim. The commanding officer, after all, was a sailor, not a lawyer. (Even a sea lawyer should not be charged with knowledge of such legal intricacies.)

The attorneys for the Government were not shown to have known that the accident had even occurred until a date

more than two years after the accrual of the claim. The motion to dismiss in the state court of October 10, 1980 was filed by private counsel retained by the insurance carrier for Econo Car. That private counsel represented Gray in all aspects of the state court proceedings. Insofar as the record in the case discloses, it appears that the first communication to Wilkinson or Legum of the fact that Gray had been acting in the scope of his naval employment was the pleading of October 10, 1980, filed seven days after the expiration of the two year period.[5] Nothing suggests that the pleading was delayed or untimely.

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5 Legum filed an administrative claim on October 29, 1980, seventeen days beyond the two year limit.

The first appearance of Government lawyers occurred[6] on April 6, 1981 with the filing of the petition for removal, followed on April 30, 1981 by a motion for substitution of the United States as party defendant and motion to dismiss. Nothing suggests that Government counsel had any knowledge whatever of the proceedings until well after the two years available to the plaintiff-appellant to meet a necessary precondition to suit had fully expired.

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6 Legum on or after October 10, 1980, telephoned a claims attorney for the United States Navy located on the Naval Base in Norfolk, Virginia. The claims attorney could find no record in his office of Gray's having reported the accident to the naval office, nor any record of Gray's having been in the Norfolk area on October 3, 1978.

Reviewing the circumstances of the case, it is evident that the two year requirement had not been met, and that unambiguously, therefore, the federal tort claim of Wilkinson was "forever barred." 28 U.S.C. §§ 2401(b), 2675(a). It is equally clear that there could be no proceeding against the governmental employee, Gray. 28 U.S.C. § 2679(b). No less established is the fact that the Government has not behaved in any unfair way, and that, as between it and Wilkinson, the latter, or, more realistically, his counsel, brought about the consequences resulting from counsel's inaction. There simply is no basis for a finding that "the actions of [Gray] or of the United States lulled plaintiff into a false sense of security...." Wollman v. Gross, supra, 637 F.2d at 550.

Accordingly, the order of dismissal in favor of the United States should be affirmed. That is not to say that we rejoice in the result, for we are left with the strong impression that Wilkinson has been denied the right to pursue his claim for injuries for reasons which were not, viewed as a whole and not simply as between himself and the United States, his fault. Cf. Thomsen, J. in Baker v. United States, 341 F. Supp. 494, 496 (D. Md. 1972), affirmed, No. 72-1708 (4th Cir. Nov. 30, 1972):

> That result in the instant case seems unfair, since no one realized until too late that Smith was in the course of his employment by the government at the time of the accident. However, no facts which would ordinarily amount to an estoppel against Smith, his insurer or the government have been shown. Other courts have applied the statute strictly against plaintiffs in circumstances

which seem to me more favorable to the plaintiff than those in the cases at bar. See, e.g., Mann v. United States, supra. If this case is appealed, I would be happy to be reversed. But under the statute and the authorities, I must dismiss the suits.[7]

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7 See Wollman v. Gross, supra, 637 F.2d at 549:

> Admittedly this application of the statute of limitations has especially harsh ramifications here where the record indicates little prejudice to the government if it had to defend this lawsuit. However, to accept Wollman's argument would be in effect rewriting the two-year statute of limitations of 28 U.S.C. § 2401(b) to allow the state statute of limitations to apply whenever plaintiff is unaware of the status of the defendant as a federal employee acting within the scope of his employment. While this may be desirable, Congress has clearly not chosen to do this and any change is its prerogative and not that of the courts.

Judge Butzner has written an appealing dissent arguing that the administrative claim did not "accure" when the accident occurred, but rather only "when the plaintiff [knew] both the existence and the cause of his injury." Reliance is placed on United States v. Kubrick, 444 U.S. 111 (1979), a case involving a claim for medical malpractice.

In the first place, such an argument was not advanced by the plaintiff either before the district judge or before us during oral argument or in his brief. We, consequently, should be disinclined to pay attention to the argument. Dees v. W.M. Webb, 590 F.2d 144, 146 (5th Cir. 1979) ("... Webb may not raise this issue the first time on appeal"); United States v. One

1971 Mercedes-Benz, 542 F.2d 912, 915 (4th Cir. 1976) ("Questions not raised and properly preserved in the trial forum will not be noticed on appeal in the absence of exceptional circumstances."); Preferred Risk Mutual Ins. Co. v. Thomas, 372 F.2d 227, 232 n.* (4th Cir. 1967) ("In argument before this court counsel for Preferred undertook to raise an additional point of error which was not raised below nor was it mentioned or argued in Preferred's brief. We do not consider it."). But see Washington Gas Light Co. v. Virginia Electric and Power Co., 438 F.2d 248, 251 (4th Cir. 1971).

That rules makes especially good sense here, for how could we, in fairness, reverse on a point the appellee has never had an opportunity to be heard on?

The second reason why the dissent's argument is unpersuasive is the very kind of thing the appellee, if afforded an opportunity, would doubtless have raised. The sole authority we have been able to locate on the point is squarely contrary to the position adopted in the dissent. Miller v. United States, 418 F. Supp. 373, 377 (D. Minn. 1976):

> Third, the plaintiff urges that his cause of action did not "accure" within the meaning of § 2401(b) until May 9, 1974, when the United States Attorney informed him by letter that Voss had been acting within the scope of his Federal employment. Plaintiff makes the startling assertion that only then did his claim "arise or become enforceable." There is no merit to this theory. The plaintiff's right to assert a claim against the Federal government was in no way dependent on the Government's admission that Voss had been acting

within the scope of his employment; the letter of May 9, 1974, was thus not a prerequisite to the assertion of the claim required by § 2401(b), and such a claim was ripe from and after the day of the collision. To accept the plaintiff's contrary contention would require adoption of a rule whereby no tort statutes of limitations would commence running in favor of any employer until he had conceded to an accident victim that the other party to the accident was acting within the scope of his employment. Plaintiff has cited no case to support that rule of law.

The approach in Miller makes imminent good sense. In medical malpractice, a patient customarily does not know, from the time of the injury, (a) that he has in fact been injured, or (b) that he has a basis for suing the doctor. Deferring accrual to a later date than the one on which the injury, unbeknownst to the plaintiff, actually

occurred in realistic and accords with the meaning of accrual.

However, as Judge Butzner has acknowledged (Slip Op.), "[o]rdinarily a claim accrues on the date of injury." In the instant case, the fact of injury and the identity of the person committing the injury were immediately beknownst. Plaintiff was possessed of sufficient knowledge to put him on inquiry as to whether Gray, a naval rating on active service, was operating within the scope of his employment. In any case, from the outset both the existence of his injury and its cause were known. What was not known, at most, was the fact that the Government would indemnify and hold harmless a naval rating who, nevertheless, clearly was and at all times remained the cause of plaintiff's

injury.

Hence, Kubrick's reference, 444 U.S. at 122, to a need to know who has inflicted the injury in order to trigger accrual, is not pertinent. It is inescapable that Gray was known to have inflicted the injury.

AFFIRMED.

BUTZNER, Circuit Judge, dissenting:

I believe the district court erred when it granted summary judgment for the United States because Tilden R. Wilkinson's administrative claim was presented two years and twenty-one days after he was struck by a car operated by Richard E. Gray, a government employee. A brief chronology places the issues raised by this appeal in perspective. Wilkinson was injured about 10:00 p.m. on October 3, 1978. His attorney filed an action in state court on September 17, 1980, after unsuccessful attempts to settle with the insurance carrier for the rental car that Gray was operating. In a pleading filed October 10, 1980, Gray's attorney asserted that Gray was a government employee acting in the scope of his employment. On October 20,

1980, Wilkinson's attorney mailed an administrative claim to the Navy, which was filed on October 24, 1980. The procedures then followed by the government are outlined in the government's brief, which I accept as accurate. After noting the filing of the administrative claim on October 24, 1980, the brief, page 7, continues:

> There followed a period of approximately four months of discovery in the state court on the question of scope of employment while, simultaneously, the Navy claims attorney investigated the circumstances to determine whether Gray had indeed been acting within the scope of his employment at the time of the accident.
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> After the claims attorney for the Navy determined to his satisfaction that Gray was acting within the scope of his employment at the time of the accident, he requested representation by the United States Attorney who thereupon removed the case from state to federal court and moved

for dismissal on the grounds that plaintiff had failed to file an administrative claim as a jurisdictional prerequisite to suit and the statute of limitations had expired.

On April 6, 1981, the United States District Attorney certified to the state court that Gray was a government employee acting in the scope of his employment and petitioned for removal pursuant to the Federal Drivers' Act, Pub. L. No. 87-258, 75 Stat. 539 (1961) [28 U.S.C. § 2679(b)-(e)]. The district court subsequently dismissed the action because Wilkinson had not filed an administrative claim within two years from the date of his injury.[1]

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1. Wilkinson v. Gray, 523 F. Supp. 372 (E.D. Va. 1981).

The statute on which the district court relied, 28 U.S.C. § 2401(b), does not by its terms expressly require the administrative claim to be presented within two years of the date of injury. Instead, Congress specified that the claim must be presented "within two years after such claim accrues ...." To determine when "such claim accures," I would adopt for the purposes of the Drivers' Act, the principles expressed in United States v. Kubrick, 444 U.S. 111 (1979). There the Court accepted the government's construction of § 2401(b) to the effect that a medical malpractice claim accrues "when the plaintiff knows both the existence and the cause of his

injury ..." 444 U.S. at 113.[2] Here Wilkinson knew of the existence of the injury on the night he was struck. But it is uncontroverted that he did not then know the critical fact that is essential for a claim against the United States--namely, that his injury was caused by a government employee acting within the scope of his employment. Nor was there immediately available to him

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2. In Kubrick, the Court went on to hold that accrual is not postponed until the claimant learns that the injury was negligently inflicted. 444 U.S. at 123. Adhering to Kubrick, I do not suggest that accrual should be deferred until Wilkinson knew or in the exercise of reasonable care should have known that Gray acted negligently while engaged in the government's business.

information about Gray's mission. By October 9, 1978, when Wilkinson consulted an attorney, Gray had left Virginia without disclosing to the local naval claims officer that he had been involved in an accident. Wilkinson's attorney wrote the rental car agency, which had furnished the car Gray was driving, on October 16, 1978, but he received no reply until the following December. Moreover, not until after suit was filed did Gray come forward and reveal that he was acting within the scope of his government employment.

In the district court, Wilkinson raised the issue which he presses on appeal. The district court's opinion states it in the following terms:

> The plaintiff's administrative claim was filed with the Naval Legal Service

> Office more than two years after the accident occurred. The plaintiff argues, however, that the Government is precluded from asserting this defense because the plaintiff was not aware that Gray was acting within the scope of his employment until the defendant's attorney filed a Motion to Dismiss in the state court after the two-year limitation period of 28 U.S.C. § 2401(b) had expired. See 523 F. Supp. at 375.

Thus, in the district court, the question was squarely presented: Did Wilkinson's cause of action accrue within the meaning of § 2401(b) when he was injured or when he became aware that Gray was acting within the scope of his employment? The district court held that it accrued on the date of the accident, stating: "[T]here is no basis for a categorical exception to Rule 2401(b) where the plaintiff is not at

the outset aware that the defendant was acting within the scope of his employment." 523 F. Supp. at 375-376.

I cannot join in approving the rationale of the district court that the claim accrued on the date of injury. Instead, I would hold that Wilkinson's claim accrued within the meaning of § 2401(b) in the context of the Drivers' Act when he or his attorney knew, or in the exercise of reasonable care should have known, that his injury was caused by a government employee acting within the scope of his employment. See Kubrick, 444 U.S. at 113 and 122.

Ordinarily a claim accrues on the date of injury. Sometimes, as here and as in Kubrick, the issue of accrual presents a mixed question of law and fact. In this case, however, remand for

for the development of the facts appears unnecessary. The administrative notice of claim was only 21 days beyond the two year period. Although Wilkinson's attorney learned soon after the accident that Gray was a government employee, the district court did not find that Wilkinson or his attorney knew, or should have known, within 21 days after the accident that Gray, driving a rental vehicle after normal working hours, was acting in the scope of his authority. Moreover, the government's brief indicates that although the Navy began its investigation shortly after October 24, 1980, several months elapsed before the naval claims attorney "determined to his satisfaction that Gray was acting within the scope of his employment at the time of the

accident...." Consequently, following Kubrick, it is logical to conclude that the claim did not accrue within 21 days after the accident, and Wilkinson's administrative claim was timely.

Having stated what I believe to be the proper construction of § 2401(b) when read with the Drivers' Act, I now explain my reasons for concluding that application of the Kubrick principle--the claim accrues when the plaintiff knows both the existence and cause of his injury--is appropriate for claims subject to the Drivers' Act. This Act, § 2679(b), provides that the Federal Tort Claims Act shall be the exclusive remedy for injury resulting from the "operation by any employee of the Government of any motor vehicle while acting within the scope of his office or

employment...." Thus, Congress did not apply the Tort Claims Act to every injury resulting from the operation of a vehicle by a government employee. Moreover, the Drivers' Act does not create any presumption that the employee was acting in the scope of his employment. Unless the government concedes this essential element of the Tort Claims Act, the burden is on the claimant to prove by a preponderance of the evidence that the accident was caused by an employee acting within the scope of his employment. Often this essential fact will be self-evident--for example, when the driver of a United States mail truck causes the injury. But when, as here, a government employee is driving a non-government vehicle after normal working hours in an area

where many government employees regularly drive on private business, the nature of the employee's activity is not readily apparent.[3] Furthermore, the facts necessary for the claimant to determine whether the employee is acting in the scope of his employment are frequently known, as here, only to the government employee or his superior officers. Indeed, the government's own reckoning its investigation to determine the true nature of Gray's mission at ten o'clock on the night of the accident took several months, and the government does not suggest that the investigation was in any way pro-

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3. The cities and counties adjacent to Hampton Roads have an exceptionally large number of naval and other government personnel.

longed because the administrative claim was filed within two years and twenty-one days rather than two years.

Furthermore, the Drivers' Act serves a dual purpose. It not only confers a cause of action against the government in an appropriate case, it also grants immunity to the government employee who is engaged in the government's business. In this respect, the Act drastically alters the common law rule governing an injured person's claim against a principal and agent, which permits the claimant to recover from the agent even if he cannot establish the principal's vicarious liability. The Act's departure from the common law suggests an additional reason why the common law concept of accrual of a cause of action on the

day of injury is inappropriate.

Although Kubrick was a medical malpractice case, the Court's analysis of the concept of accrual in § 2401(b) is pertinent to the Drivers' Act. In Kubrick, 444 U.S. at 122, the Court accepted as the time of accrual the date the plaintiff possesses "the critical facts that he has been hurt and who has inflicted the injury." The second critical fact--"who has inflicted the injury"--has two components: (1) the name of the person and (2) his identity as a government employee acting in the scope of his employment. Until the plaintiff has had a reasonable opportunity to ascertain this critical fact, he cannot determine whether he has a claim against an individual or the government. Until

then, he cannot determine who, in the eyes of the law, inflicted his injury. Obviously, by the terms of the Drivers' Act he cannot have a claim against both the principal and the agent as he otherwise would have at common law.

Therefore, the claim against the government should not accrue until the claimant in the exercise of reasonable diligence has an opportunity to ascertain whether he can establish an essential element of a cause of action under the Tort Claims Act--that is, whether the injury was caused by an employee acting within the scope of his employment. To hold, as the district court did, that the claim accrues on the date of the injury is contrary to the plain language of § 2401(b) and the sensible construction of this section accepted

by the Supreme Court in Kubrick. The vice of the district court's decision is its determination that a claim against the government accrues before even a diligent claimant learns the critical fact that the driver who injured him was given cause for such a claim. Thus, the district court's decision effectively reduces the two year limitation period from the time the claim accrues that Congress expressly provided in § 2401(b).

Other judges, though approaching the issue from a somewhat different perspective, have perceived the inequity of the result reached by the district court. See Wollman v. Gross, 637 F.2d 544, 550-55 (8th Cir. 1980) (Adams, J., dissenting); 646 F.2d 1306 (1981) (Lay, Bright, McMillian and Arnold, J.J.,

dissenting from denial of rehearing en banc). Indeed, the result reached by the district court is so unjust and so contrary to congressional intent that a similar case would not be dismissed in the Second and Tenth Circuits.[4] In Kelley v. United States, 568 F.2d 259 (2d Cir. 1978), the court held that when

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4. It also appears that a similar case would not be dismissed in the Seventh Circuit. See McGowan v. Williams, 623 F.2d 1239 (7th Cir. 1980), which approves Whistler v. United States, 252 F. Supp. 913 (N.D. Ind. 1966). McGowan also cautions that Steele v. United States, 599 F.2d 823 (7th Cir. 1979), on which the Wollman majority and the district court relied, does not pertain to actions governed by the Drivers' Act. See 623 F.2d at 1243.

a claimant institutes suit against a government employee in a state court within the time limited by state law, it is unnecessary to determine whether the action accrued at a date later than the accident. Timely institution of the suit in a state court precludes dismissal even though the administrative claim is filed more than two years after the accident. 568 F.2d at 262-68.[5] See

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5. In the district court and on appeal, Wilkinson relied on Kelley. The district court mistakenly, I believe, considered that Kelley was inapposite on the ground that there the government had lulled the plaintiff into a false sense of security. See 523 F. Supp. at 376. Kelley, however, was not decided on the basis that the government lulled the claimant into a false sense of security. Although the court of appeals referred to this description of the government's conduct by the district court, see 568 F.2d at 262, it did not predicate its decision on this theory of estoppel. See 568 F.2d at 262-68.

also Henderson v. United States, 429 F.2d 588 (10th Cir. 1970). Kelley and Henderson reach the proper result on the basis of logical reasoning that is consistent with the legislative history. In some respects, their rationale is preferable to the reasons assigned in this dissent. Nevertheless, I believe that Kubrick, which was decided after Kelley and Henderson, provides adequate, authoritative precedent for reversing the district court and reinstating Wilkinson's action.[6]

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6. Kubrick, it should also be noted, was decided three years after Miller v. United States, 418 F. Supp. 373 (D. Minn. 1976), which is the single authority cited in opposition to the concept of "accrual" that Kubrick explains. Lacking the benefit of Kubrick, the Miller court quite understandably erred, and its ruling, I believe, is no longer acceptable as sound precedent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

TILDEN R. WILKINSON,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
RICHARD EVANS GRAY,	)	NO. 81-344-N
Defendant.	)	

OPINION AND ORDER

Plaintiff, Tilden Wilkinson, initiated this action on September 17, 1980, in the Circuit Court of the City of Virginia Beach against the individual defendant Richard Gray. The plaintiff is seeking damages for personal injuries resulting from the defendant's alleged negligent operation of a motor vehicle on October 3, 1978. On April 6, 1981, the Assistant United States Attorney removed the case to federal court,

certifying under 28 U.S.C. § 2679(d) that the defendant was acting within the scope of his employment as an employee of the United States at the time the accident occurred. Subsequently, on April 30, 1981, the United States filed a motion to be substituted as defendant and to dismiss for lack of jurisdiction based upon the plaintiff's failure to comply with the jurisdictional terms of the Federal Tort Claims Act, which requires, as a prerequisite to commencement of a civil action, the filing of a written claim with the appropriate federal agency within two years of accrual of the cause of action. 28 U.S.C. §§ 2675(a), 2401(b). The plaintiff has opposed that motion, and has filed a Motion to Remand this action to the state court to determine

if defendant Gray was acting within the scope of his employment as an employee of the Government at the time of the accident. The parties were heard on their various motions on September 14, 1981. At that hearing, both parties stated to the Court that they had nothing further to present to the Court by way of evidence or argument in support of their respective positions on the motions.

The Court will treat the motion of the United States to dismiss as one for summary judgment, pursuant to Rules 56 and 12(b) of the Federal Rules of Civil Procedure, inasmuch as the parties have submitted matters outside the pleadings, which matters have been considered in ruling upon the motion. There are two questions to be resolved

to determine the outcome of the United States Government's motion for summary judgment and the plaintiff's motion for remand:

(1) Whether Ricard Gray was a federal employee acting within the scope of his employment at the time of the accident, and

(2) Whether, following substitution of the United States as defendant, the requirement of filing an administrative claim is a prerequisite to federal jurisdiction.

I. Scope of Employment

The Federal Tort Claims Act provides that the United States District Courts shall have exclusive jurisdiction

of all tort actions in which a federal employee involved in an accident is acting within the scope of his employment at the time of the collision. 28 U.S.C. § 2679(b). In determining whether or not a federal employee's acts are within the scope of his employment, this Court is bound to apply state law. Williams v. United States, 350 U.S. 857 (1955); Davies v. United States, 542 F.2d 1361, 1362 (9th Cir. 1976).

The test in Virginia for determining if an act is committed within the scope of employment is "whether the act was done by virtue of the employment and in furtherance of the master's business." Strohkorb v. United States, 268 F. Supp. 526, 528 (E.D. Va. 1967), aff'd, 393 F.2d 137 (4th Cir. 1968).

See also Manuel v. Cassada, 190 Va. 906, 59 S.E.2d 47 (1950); McNeill v. Spindler, 191 Va. 685, 62 S.E.2d 13 (1950); Abernathy v. Romaczyk, 202 Va. 328, 177 S.E.2d 88 (1960). An act is deemed to be within the course of employment if it is fairly and naturally incident to the business and if it is done while the servant was engaged upon the master's business. See Broaddus v. Standard Drug Co., 211 Va. 645, 652-53, 179 S.E.2d 497, 503 (1971); Davis v. Merrill, 133 Va. 69, 77, 112 S.E. 628, 630-31 (1922). In United Brotherhood of Carpenters and Joiners of America, A.F.L.-C.I.O. v. Humphreys, 203 Va. 781, 786-87, 127 S.E.2d 98, 101-02 (1963), the court held that

> [t]he test of the liability of the principal for the tortious acts of his agent

> is not whether the tortious act itself is a transaction within the ordinary course of the business of the principal or within the scope of the agent's authority, but whether the service itself in which the tortious act was done was within the ordinary course of such business or within the scope of such authority. [Citing authorities.]

At the time of the accident, defendant Gray was on active duty in the United States Navy. He was assigned to the U.S.S. MILLER, which was then home ported in Boston, Massachusetts. Gray was supplied with a rental van and directed by his commanding officer to drive to Norfolk for temporary additional duty. Gray's duties in Norfolk consisted of picking up and delivering parts and mail for the ship. Gray was provided a per diem allowance for mileage, food, and lodging. At the

time of the accident, Gray was returning from delivering the ship's mail with the intention of eating dinner and going to his hotel room. Given these facts, the Court is of the opinion that Gray was acting within the scope of his employment at the time the accident occurred.

The plaintiff relies on Strohkorb v. United States, 268 F. Supp. 526 (E.D. Va. 1967), to support his argument that Gray was not acting within the scope of his employment at the time of the accident. However, Strohkorb is factually dissimilar to the present case. In Strohkorb a duty officer driving his own vehicle, went home for supper. On his return, he collided with the plaintiff. The court found that it was not the defendant's employment "which brought

his journey to his home or otherwise created the exposure to the perils of his trip." 268 F. Supp. at 528-29.

Yet, in the present case, Gray traveled to Norfolk for the sole purpose of serving Government business. The Government argues, and we agree, that it was reasonable to expect that Gray would travel for lodging and a place to eat. In fact, Gray was authorized both a mileage per diem and a subsistence allowance for such purposes.

The plaintiff has failed to refute in any way the affidavits and other evidence supporting the claim of the United States that Gray was, at the time of the accident, acting within the scope of his employment. Therefore, this proceeding is deemed a tort action against the United States pursuant to

28 U.S.C. § 2679(d) (1976). Accordingly, the United States' Motion for Substitution is GRANTED and the plaintiff's Motion to Remand is DENIED.

II. Administrative Claim Requirements

As Gray was a federal employee acting within the scope of his employment at the time of the accident, the plaintiff's exclusive remedy is against the United States under the Federal Tort Claims Act. 28 U.S.C. § 2679(b). Section 2675(a) of the Federal Tort Claims Act provides that no action shall be commenced against the United States unless the claimant first presented the claim to the appropriate federal agency. This administrative claim must be presented "to the appropriate federal agency within two years after such claim accrues." 28 U.S.C.

§ 2401(b). The question presently facing the Court is whether the plaintiff's case must be dismissed for failure to file an administrative claim where the United States is substituted as a party after the two-year statutory period expired.

It is well settled that the United States may not be sued without its specific consent and that Congress may specify the terms and conditions of such suits as it authorizes. United States v. Sherwood, 312 U.S. 584 (1941). Congress created a limited waiver of sovereign immunity in the Federal Tort Claims Act. United States v. Kubrick, 444 U.S. 111 (1979). The waiver allows suit only on prescribed terms and conditions, the first of which is the filing of an administrative claim. Moreover,

the Fourth Circuit Court of Appeals has held that the filing of an administrative claim as a prerequisite to suit is jurisdictional and cannot be waived. Kielwien v. United States, 540 F.2d 676, 679 (4th Cir. 1975), cert. denied, 429 U.S. 979 (1976); see also House v. Mine Safety Appliances Co., 573 F.2d 609, 614 (9th Cir.), cert. denied, 439 U.S. 862 (1978); Lunsford v. United States, 570 F.2d 222 (8th Cir. 1977); Molinar v. United States, 507 F.2d 508 (6th Cir. 1974); Best Bearings Co., v. United States, 463 F.2d 1177, 1179 (7th Cir. 1972); Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971); Griffin v. Lee, No. 80-708 (E.D. Va. November 25, 1980), aff'd, No. 10-1076 (4th Cir. July 27, 1981).

The plaintiff's administrative

claim was filed with the Naval Legal Service Office more than two years after the accident occurred. The plaintiff argues, however, that the Government is precluded from asserting this defense because the plaintiff was not aware that Gray was acting within the scope of his employment until the defendant's attorney filed a Motion to Dismiss in the state court after the two-year limitation period of 28 U.S.C. § 2401(b) had expired. In support of this approach, the plaintiff relies on Kelly v. United States, 568 F.2d 259 (2d Cir.), cert. denied, 439 U.S. 830 (1978); Harris v. Burris Chemical, Inc.,

490 F. Supp. 968 (N.D. Ga. 1980).[1] We find this argument unpersuasive. See Steele v. United States, 599 F.2d 823 (7th Cir. 1979) (holding action untimely even though the plaintiff was unaware that an agency of the United States was the party allegedly negligent in failing to warn of condition which resulted in plaintiff's injuries); Lien v. Beehner, 453 F. Supp. 604 (N.D. N.Y. 1978) (holding action untimely even though government employment of tort feasors was shielded both from the public and the plaintiff); Baker v. United States,

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[1]The plaintiff also relies on United States v. LePatourel, 593 F.2d 827 (8th Cir. 1979), to support his contention that his failure to file an administrative claim within the statutory period of 2401(b) should not require dismissal of this action. However, LePatourel is inapposite because it really dealt with the retroactive application of 28 U.S.C. §§ 2401(b), 2675 to automobile accidents involving federal judges.

341 F. Supp. 494 (D. Md. 1972) (action untimely even though plaintiff had no reason to know that conduct of the federal employee-tortfeasor was within the scope of employment.

First, there is no basis for a categorical exception to Rule 2401(b) where the plaintiff is not at the outset aware that the defendant was acting within the scope of his employment. Wollman v. Gross, 484 F. Supp. 598, 604 (D. S.D.), aff'd, 637 F.2d 544 (8th Cir. 1980); Meeker v. United States, 435 F.2d 1219 (1970); Reiser v. DiPietro, 78 F.R.D. 541 (N.D. Ill. 1978); Fuller v. Daniel, 438 F. Supp. 928 (N.D. Ala. 1977); Driggers v. United States, 309 F. Supp. 1377 (D. S.C. 1970). In Kelly, the plaintiff was struck by a vehicle owned and operated by an employee of

the Department of Agriculture on November 8, 1972. The plaintiff filed suit in May of 1973. The defendant did not refer to his federal employment and it was not placed on the record until March 5, 1974, nearly a year after filing suit. Another eight months passed before the United States removed the action and moved to be substituted as defendant. The court found that the "Government could not lull plaintiffs into a false sense of security by waiting until plaintiffs' time to file an administrative claim had expired and thereupon move to be substituted and dismissed." 568 F.2d at 262.

Also in Harris v. Burris, 490 F. Supp. 968 (N.D. Ga. 1980), the accident occurred on February 21, 1979, and the

plaintiff filed suit in state court on July 23, 1979. However, the United States waited until February 8, 1980, to move for removal and dismissal. In denying the motion to dismiss, the court found that "[n]othing in the record indicates that prior to filing her state court action, the plaintiff knew or should have known of the federal aspect of the case." Id. at 971.

The facts of the present case, however, contain no such basis for creating an exception to filing requirements of Rule 2401(b). The plaintiff was injured on October 3, 1978. The plaintiff, however, waited until September 17, 1980, to file his action in state court. On October 10, 1980, the defendant filed a Motion to Dismiss and Special Plea of Jurisdiction in

state court. Further, the plaintiff was on notice at the outset that the defendant was an employee of the United States Government. Clearly, the facts of this case do not present a situation where the Government "lull(ed) [the] plaintiff into a false sense of security" by deliberately waiting two years before moving for removal and dismissal. Rather, this case is similar to that of Wollman v. Gross, supra, where the court dismissed the plaintiff's suit for failure to file a timely administrative claim. The court found that "the plaintiff knew all the essential facts of the case except the fact that the government was vicariously liable under the Federal Tort Claims Act...." 484 F. Supp. at 604.

For the same reason, in the

present case, the Court concludes that the plaintiff's failure to exhaust the administrative requirements of 28 U.S.C. § 2675(a) requires dismissal of plaintiff's action. Although the court recognizes the harshness of this result, to hold otherwise would undermine the importance of the administrative filing requirements of § 2675 (a) as a prerequisite to jurisdiction and therefore allow the plaintiff to do indirectly that which he could not do directly. Accordingly, the Government's motion to dismiss is GRANTED.

s/J. Calvitt Clarke, Jr.
United States District Judge

September 30, 1981
Norfolk, Virginia

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

No. 81-2080

Tilden R. Wilkinson,

Appellant

vs.

United States of America,

Appellee

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this court that the judgment of the said

District Court appealed from, in this cause, be, and the same is hereby, affirmed.

s/William K. Slate, II
Clerk

FILED
April 27, 1982
U.S. Court of Appeals
Fourth Circuit

A True Copy, Teste:

William K. Slate, II,
Clerk

By _____
Deputy Clerk